SUBJECT INDEX.

LIST OF CASES.

Supreme Court of the United States.

October Term, 1918.

No. 308.

AMERICAN FIRE INSURANCE COMPANY,
Plaintiff in Error,
v.
KING LUMBER AND MANUFACTURING COMPANY,
Defendant in Error.

Motion to Dismiss the Writ of Error for Want of Jurisdiction and to Affirm the Decision of the Court Below.

Comes now the defendant in error, the King Lumber and Manufacturing Company, by its attorneys, Benjamin Micou, John H. Treadwell and E. D. Treadwell, appearing in its behalf and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction upon the grounds hereinafter set forth in the accompanying brief.

It is further represented to the court that it is manifest that the writ of error was taken for delay only and it is moved that the decision of the Supreme Court of Florida be affirmed. Further it is represented that the case is of a character that does not justify extended argument and it is requested that the same be transferred to the Summary Docket.

BENJAMIN MICOU,
JOHN H. TREADWELL,
E. D. TREADWELL,
Counsel for Defendant in Error.

Notice to Gustavus Remak, Jr., Esq., and to James F. Glenn, Esq., Counsel for the American Fire Insurance Company, Plaintiff in Error in the above cause.

Please take notice that provided the case above referred to has not before Monday, the 28th of April, 1919, been called and either submitted or argued that on that date, at the opening of the Court or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for a decision of the court thereon.

Attached hereto is a copy of the motion and the brief to be submitted in support thereof.

BENJAMIN MICOU,
Counsel for Defendant in Error.

Affidavit as to service of notice of motion and brief through the mails in accordance with rule 6 of the Supreme Court of the United States is filed in this case.

IN THE

Supreme Court of the United States.

October Term, 1919.

No. 308.

AMERICAN FIRE INSURANCE COMPANY, a Corporation,
Plaintiff in Error,
v.
KING LUMBER AND MANUFACTURING COMPANY,
a Corporation,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS FOR WANT OF JURISDICTION.

STATEMENT OF THE CASE.

The case comes here by writ of error from the Supreme Court of Florida. The suit was brought by defendant in error against plaintiff in error to recover for losses sustained by fire covered by two policies of insurance. The judgment of the Circuit Court of Florida was on demurrer and in favor of defendant in error here for $2,916.10 for its damages together with the further sum of $300 for reasonable attorney's fee and also its costs (p. 34, rec.). The plaintiff in error in this court and the defendant in error were respectively plaintiff in error and defendant in error in the Supreme Court of Florida and henceforth for brevity we will refer to them as plaintiff and defendant respectively.

The case as presented by the pleadings is that the plaintiff, a Pennsylvania corporation, issued two policies of fire insurance to defendant, a Florida corporation, through Lowery & Prince of Tampa, Florida, on property in Florida, and through said Lowery & Prince received the premiums on the policies. After loss occurred and it was sued on said policies by defendant here, it claimed that the policies were executed in Pennsylvania; that it was not engaged in the transaction of business in Florida; that it had no agent or representative there but that the policies were secured in Florida by defendant through Lowery & Prince of Tampa, Florida, as brokers of defendant. The policies each contained the following provision.

> "Warranted same gross rate, terms and conditions as and to follow the American Central Insurance Company, of St. Louis, Mo., and that said company has throughout the whole time of this policy, at least $5,000.00 on the identical subject matter and risk and in identically the same proportion on each separate part thereof; otherwise this policy shall be null and void."

Plaintiff also claimed that without its knowledge, the American Central Insurance Company of St. Louis, Mo., had cancelled its policies prior to the loss and at the time of the loss carried no insurance on the property.

Plaintiff admitted the allowance of a policy by it on the property of the defendant in Florida in April, 1908, and that it continued to write and issue policies on this property including those sued upon, upon the written request of Lowery & Prince as brokers of defendant. Plaintiff by rejoinder further averred that Lowery & Prince transmitted to it at its main office in

Philadelphia the original and subsequent applications for insurance upon defendant's property; received by mail the policies for defendant and transmitted by mail for it the amount of the premium less the usual broker's commission. It then denied that by issuing the policies or otherwise it was engaged in the transaction of business in Florida and that it paid to Lowery & Prince for plaintiff any premiums on the policies written by plaintiff and that Lowery & Prince were agents of plaintiff and denied that it advised or consulted with Lowery & Prince as to the advisability of the risk or otherwise, except to the extent that it did request information from them as to the subject matter insured and the companies carrying insurance thereon.

Defendant denied that at the time the policies went into force and were executed and delivered that the plaintiff was not engaged in the transaction of business in the State of Florida and alleged that at that time and as far back as 1908 that plaintiff was transacting business in Florida and with defendant and that on April 14, 1908, it, through Lowery & Prince, of Tampa, Florida, assumed a risk by a policy of fire insurance on part of defendant's property described in policies it sued on and that said policy so written was from time to time renewed and kept in force and additional insurance written on said property, and finally, in 1912, the policies herein sued on were written and plaintiff before accepting the risk provided for by the first policy written in 1908 consulted with the said Lowery & Prince as to the nature of the risk assumed, and from time to time, from then to the date of the fire, consulted and advised with Lowery & Prince as to the physical condition of defendant's property and as to the advisability of assuming a risk thereon and relied

upon the said Lowery & Prince for its information on this subject; that the said Lowery & Prince caused plaintiff to write the policy of 1908, procured it to renew said policy from time to time and to finally write and issue the policies here sued on, and that defendant from 1908 to the date of the policies here sued on paid to the said Lowery & Prince premiums charged by the plaintiff for said policies and said premiums were forwarded by the said Lowery & Prince less their commission, which commission was allowed by plaintiff, and at the time the policies sued on herein were delivered to defendant it paid the premium charged by plaintiff therefor to Lowery & Prince who forwarded said premium to plaintiff. Defendant denied that plaintiff at the time of the execution and delivery of the policy sued on had no agent or representative in Florida but stated the fact to be that Lowery & Prince, who procured and caused said policies to be written, who collected the premiums and who forwarded the same to the plaintiff were agents of the plaintiff.

Defendant admitted that the two policies sued on contained the warranty quoted above and states that Lowery & Prince, the agent of plaintiffs in error when they delivered to it the policy sued on, called its attention to said warranty clause and stated to it that said clause would not affect defendant and should be disregarded by it, giving as their reason that defendant had at the time in the American Central Insurance Company of St. Louis, $6,500 of insurance covering the items insured by the policies sued on herein.

That at this time the plaintiff was carrying a large amount of insurance, approximately $45,000, in various companies and did not keep up very closely with the amount of the insurance in any particular com-

pany, being careful only to keep the total amount approximately $45,000 in reputable old line companies, and that it therefore relied upon the representation of said Lowery & Prince, who stated that they had investigated the policies of defendant in the said American Central Insurance Company of St. Louis, and that repliant had $6,500 of insurance as aforesaid. Further that relying upon the representation of Lowery & Prince, agents of the plaintiff, and upon their instruction to disregard said warranty that defendant accepted said policies and paid the said Lowery & Prince the premium therefor charged by the plaintiff. Further that some time prior to July 25, 1912, Lowery & Prince as agents of plaintiff notified defendant that the American Central Insurance Company was desirous of cancelling its policy No. 303149 for $1,500 and suggested to defendant that there be substituted for this policy one in a like sum in the Peoples National Fire Insurance Company of Philadelphia. That this information coming from said Lowery & Prince, agents of the plaintiff, and this suggestion having been made by said agents, defendant agreed to the cancellation of said policy and the substitution of a policy with the Peoples National Insurance Company of Philadelphia. Further that some time prior to October 27, 1912, said Lowery & Prince, agents of plaintiff, notified defendant that the American Central Insurance Company of St. Louis, Mo., was desirous of cancelling its policy No. 303192 in the sum of $1,500 and suggested that there be substituted therefor a policy in a like amount in the American Union of Philadelphia. That this information and suggestion being given by the agents of plaintiff as aforesaid, defendant agreed that said last mentioned

policy be cancelled and said policy in the American Union of Philadelphia be substituted therefor. Further that said Lowery & Prince, agents of plaintiff as aforesaid, assured defendant that the cancellation of the policies above mentioned was not a violation of the warranty set forth in the policy sued on provided a like amount of insurance was carried in some other old line insurance company. Further, that as soon as said policies were cancelled new policies were substituted in pursuance of the suggestion above in the companies above mentioned. And therefore defendant denied that said policies were cancelled without the knowledge of plaintiff, but averred that said policies were cancelled with the full knowledge and consent and at the suggestion of Lowery & Prince, who were the agents of plaintiff acting for it in the State of Florida, who as such agents had caused the policies sued on to be issued, had collected the premiums paid by defendant for said policies, forwarded the same to plaintiff, and that plaintiff thereby waived said warranty clause and ratified and confirmed the cancellation of the said policies of insurance in the American Central Insurance Company of St. Louis, Mo. Defendant further denied that the policies of insurance sued on were delivered in Pennsylvania, but stated the fact to be that the same were delivered by Lowery & Prince, as agents for plaintiff, to defendant in Florida and accepted by defendant in said State (pp. 1–31, rec.).

Statement of the facts by the Supreme Court of Florida admitted to be correct (pp. 37 to 43, rec.). Opinion of the court (pp. 45 to 46, rec.).

The following are general statutes of Florida in effect at the time of the transaction in question:

"2765. Agents.—Any person or firm in this

State, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance or any renewal thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association, firm or individual, or who in any wise, directly or indirectly makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual."

"2777. Who agent of company.—Any person who solicits insurance and procures applications therefor shall be held to be agent of the party issuing a policy upon such application, anything in the application or policy to the contrary notwithstanding."

In plaintiff's brief, pp. 8 to 15, are set out the above sections and other sections regulating the transaction of business by foreign insurance companies in Florida.

The two sections we quote though, are the only ones bearing directly on this case or which were referred to by the Supreme Court of Florida.

The assignments of error on appeal to the Supreme Court of Florida, one to five, inclusive, pp. 35 to 36, rec., were relied upon as presenting a Federal question which it is claimed was so decided by the Supreme Court of Florida as to give this court jurisdiction of the case. Remaining assignments of error on appeal to the Supreme Court of Florida 6 to 11, p. 36, rec., are directed to the merits of the case.

We refer in our brief to the assignments of error to the Supreme Court of Florida rather than to the assignments of error to this court because to determine whether that court decided a question that would give this court jurisdiction it is necessary to know what was before the Supreme Court of Florida. Further there is a variance in the language used between the assignments of error to the Supreme Court of Florida, pp. 35 to 36, rec., and the assignments of error to this court, p. 73, rec.

The assignments of error to this court, six in number, are none of them stated in the identical form of any of the assignments to the Supreme Court of Florida. The sixth assignment here alleges that the construction given by the Supreme Court of Florida to sections 2765 and 2777 of the General Statutes of Florida violated Sec. 10, Art. I of the Constitution of the United States. There was no assignment of error before the Supreme Court of Florida directed to raising a question of any violation of Sec. 10, Art. I, of the Constitution.

Further we respectfully submit that a careful reading of the six assignments of error to this court, p. 73, rec., will show that plaintiff has made no assignments of error here that go to the merits of his case but only assignments that go to the jurisdiction of this court.

This Court Has No Jurisdiction.

The first five assignments of error to the Supreme Court of Florida, pp. 35 to 36, rec., suggest that the Circuit Court of Florida by holding that Sec. 2765 of the General Statutes of Florida applied to the contracts of insurance sued on and which plaintiff assumed were made in the State of Pennsylvania, denied.

First, full faith and credit to the laws of Pennsylvania in violation of Sec. 1, Art. IV, of the Constitution of the United States. 1st assignment, p. 35, rec.

Second, violated the following provisions of the 14th amendment to the Constitution of the United States, i. e.,

1. That no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. 2d assignment, p. 36, rec.

2. Nor shall any State deprive any person of life, liberty or property without due process of law. 3d assignment, p. 36, rec.; and that

3. No State shall deny to any person within its jurisdiction the equal protection of the laws. 4th assignment, p. 36, rec.

Further, by its fifth assignment, that the court below, by holding that Sec. 2765 applied to the contracts sued on, etc., and made in Pennsylvania, denied to plaintiff the benefit of Art. IV of the Constitution of the United States which provides that "the judges of the United States shall be bound thereby by anything in the Constitution of the United States or laws of any State to the contrary notwithstanding."

The Supreme Court of Florida by holding Sec. 2765 of the General Statutes of the State valid and applicable to the contracts sued upon did not draw in question the validity of the statute of any State on the ground of its being repugnant to the Constitution of the United States or violative of any amendment to the Constitution, a thing it would have had to have done before this court would acquire jurisdiction.

The court based its decision on the contracts sued on on the ground that they were made in Florida through

Lowery & Prince and that Lowery & Prince were agents of plaintiff and the court refused to give Section 2765 extra territorial effect, pp. 52 to 53, rec. At the outset the court said:

> "As we read the pleadings in the instant case and the respective orders made thereon, which form the basis for the assignments now under consideration, we fail to find where any such orders had the effect of giving extra territorial effect to either section 2765 or 2777 of the General Statutes of 1906 or extending their operation into the State of Pennsylvania, as the defendant contends. The pleadings show that the property upon which the two policies were issued was situated in Florida and that such policies were delivered to the plaintiff in Florida by Lowery & Prince, who were not only acting as insurance brokers for the plaintiff in the transaction but also as agents for the defendant. In other words, we are of the opinion, and so hold, that the two policies of insurance were and are Florida contracts and that by reason of the transactions had by the defendant with Lowery & Prince and what was done by and through them, the defendant paying them 'the usual broker's commission' for effecting such insurance, the defendant was doing business in Florida, and that Lowery & Prince were the defendant's agents, within the provisions of Section 2765 and 2777 as was held by the Circuit Court" (p. 52, rec.).

The Florida Supreme Court could hardly have stated more explicitly the grounds for its decision.

It is too well settled by this court to require citation of authorities that where the highest court of a State does not pass upon a federal question even though properly raised, this court does not acquire jurisdiction unless there was no way the court could have made

its decision without passing upon the federal question. That was not the case here. It was not necessary for the Supreme Court of Florida in deciding this suit to pass upon a federal question not even presented to it, save on the assumption, not admitted by the court, that the contracts sued on were made in Pennsylvania.

We would say though that if the Supreme Court of Florida, in sustaining the validity of Section 2765 or of 2777 and holding that Lowery & Prince were agents for the plaintiff in making the contracts sued on, had also held that the contracts were made in Pennsylvania, such a holding would in no wise have denied full faith and credit to the laws of Pennsylvania or have violated any provisions of the Constitution of the United States or amendments thereto. The Supreme Court of Pennsylvania has held that the issuance of a policy of fire insurance by a foreign insurance company upon properties situated in a State other than that of its creation is doing business in the State where the property insured is and the insuring company is bound by the laws of that State.

Swain v. *Munson*, 191 Pennsylvania, 582.

We will quote from the above case in our brief on the merits and also cite other authorities which bear out the view before stated.

The writ should be dismissed for want of jurisdiction here and the decision of the Supreme Court of Florida should be affirmed.

BRIEF AND ARGUMENT ON MERITS.

Throughout the Record runs the idea that plaintiff was ready and willing to do business in Florida to receive the benefits therefrom but to incur no liabilities. That foreign corporations should undertake to do

in Florida what was here attempted justifies the wisdom of the Florida legislature in enacting Sec. 2765, providing that any one receiving or receipting for money on or for any contract of insurance to be transmitted to an insurance company for a policy of insurance or renewal of a policy shall be deemed *to all intents and purposes* an agent of said company.

Those who stand ready and willing to issue fire insurance policies in Florida after an examination of the property to be insured and recommendation as to the risk, moral and otherwise, by persons resident there and qualified to pass on these questions, and then if they approved the risk to accept from the hands of such persons the business they secure for them, should not be allowed after a loss occurs to hide behind the subterfuge here invoked and say in effect to the insured, "A" of Florida was kind enough to suggest your property for insurance by us, examine its condition and surroundings, report to us the character of risk it involved and the moral risk we would run by granting you insurance, and after we acted on "A's" report and recommendation and approved the same, was kind enough to see to collecting the premiums from you and transmitting the same to us less a commission agreed on between "A" and ourselves, but we, of course, knew all along this was nothing but "camouflage," whereby we got our premiums but upon a loss occurring escaped liability because this kind person who for the consideration we paid him attended to these matters for us was never our agent.

Owing to the fact that plaintiff bases his defence on the assumption that the transaction out of which this suit arose did not occur in Florida, it becomes necessary at times in discussing the case on its merits

to touch on matters incident to the first five assignments of error to the Supreme Court of Florida which have hitherto only been considered as bearing on the jurisdiction of this court. Further, owing to the fact already alluded to that the assignments of error to this court, p. 73, rec., seem to go only to the jurisdiction of this court and not to the merits of the case we will be obliged in this discussion to follow the assignments of error on the merits to the Supreme Court of Florida, 6 to 10, respectively, p. 36, rec.

PLAINTIFF WAS TRANSACTING BUSINESS IN FLORIDA.

The fundamental error of counsel for plaintiff is the assumption that the transaction of issuing the policies of insurance sued on occurred entirely beyond the State of Florida.

We admit the statutes of Florida can have no extra territorial jurisdiction and that the cases cited by counsel for plaintiff to establish that fact, support his contention. Counsel in the Supreme Court of Florida quoted from an opinion from Chief Justice White:

> "It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State, and in the State of New York, and there destroy freedom of contract without throwing down the constitutional barrier by which all the states are restricted within the orbits of their lawful authority, and upon the preservation of which the government under the constitution depends."

There can be no gainsaying the law as laid down by the Chief Justice nor do the exigencies of the case so require. The quotation is entirely in our favor, for with the same force of reasoning it is equally true that it would be impossible to permit the statutes of

Pennsylvania to operate beyond the jurisdiction of that State and in the State of Florida, and thereby destroy the effect of the laws of Florida applicable to a fire insurance company of another State who transacted business in Florida.

> "If a foreign corporation transacts business in a State other than that of its incorporation, it is bound by the laws of the State where the business is transacted."
>
> *Orient Insurance Company* v. *Daggs*, Vol. 19, Supreme Court Reports of the United States, page 281. 33 S. W. Reporter 992. 19 Cyc. of Law and Procedure, pages 1220 and 1221.

The last authority cited states the law as follows:

> "A corporation can claim no right to do business in another State, except subject to the conditions imposed by its laws. It has been well said that a corporation which seeks by its agents to establish a domicile of business in a State other than that of its creation, must take the domicile as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there. It becomes amenable to the laws of the latter State and to the processes of its court upon the same principal and to the same extent as natural persons or domestic corporations."

See also *Insurance Company* v. *Morse*, 20th Wallace, p. 458. New York Life Insurance Company.

See also the case of *New York Life Insurance Company* v. *Fannie Gravens*, from the Supreme Court of the United States, reported in Volume 20, p. 962, Supreme Court Reports, where it is held:

> "The interstate character of a contract of insurance made by a resident of one State with a

corporation of another State, does not give it immunity from the control of the State in which the insured resides, and in which the corporation does business, and where it is further held that:

"The business of insurance is not commerce, and a State's statute regulating contracts of insurance made between residents of that State and corporations of another State is not invalid as a regulation of interstate commerce."

Much depends upon whether or not the course of dealings carried on by plaintiff with defendant from 1908 to the date of the loss, during which time various policies of fire insurance were issued by plaintiff on property in Florida, was doing business within the State of Florida, because if the writing of policies of fire insurance by the plaintiff upon the defendant's property in Florida constituted doing business within the State, then by so carrying on said business plaintiff assented to and became answerable to the statutory laws of Florida, and was bound thereby.

B. & O. R. R. v. *Harris*, 12 Wallace, E. S. 65.
20th Law Edition 354.

Chicago & N. W. R. R. Co. v. *Whitton*, 13th Wallace U. S. 270 to 285.
20th Law Edition, 571 to 576.

Exparte Schollenberger, 96 U. S. Reports, 369 to 376.
24th Law Edition, 853 to 854.

This brings us squarely to whether the writing of these fire insurance policies by plaintiff on property in Florida constituted doing business in Florida.

Counsel for plaintiff relies on *Old Wayne Mutual Life Association* v. *Sarah McDonough, et al*, 204 U. S. p. 8, in support of his contention that the issuing of

an insurance policy by a foreign insurance company in a State other than that of its creation, does not constitute doing business within said State.

A mere reading of this decision will show that the case is not applicable and does not bear out the contention. First, because the facts were entirely different from the facts in the present case

The facts in the *McDonough* case were that a policy of life insurance was issued by an insurance company in Indiana, upon the life of a resident of the State of Pennsylvania which provided that unless suit was brought upon the policy in six months after the death of the insured, any claim thereunder would be barred. Under the laws of Pennsylvania a provision in an insurance policy of this nature was legal, but under the laws of Indiana, was void. The insured died in Pennsylvania. No suit was brought upon the policy until the expiration of six months, and when brought the plaintiff was confronted with the six months clause, and to evade the same, alleged in his declaration not only that the contract was an Indiana contract, but with special stress that the contract was entered into *at* Indianapolis.

For all known, and so far as the court deciding the case knew, the insured might have made a personal application for the policy in Indianapolis, have been examined there and the policy delivered to him there, and afterwards moved to Pennsylvania. There is nothing in the declaration in the *McDonough* case to show that the policy was received by the insured in Pennsylvania, that the insured was examined in Pennsylvania, or that he paid the premiums there, or that anything was done in Pennsylvania in connection with the issuance of the policy, its delivery or the collection

of the premiums thereon. On the contrary, the declaration by its allegation, precludes the idea that such was the case. The substance of the decision of the Supreme Court of the United States in the *McDonough* case is, that it recognized the principle that where a foreign corporation comes into a State other than that of its creation and transacts business there, that it accepts the laws of such State, and is bound thereby, but that this principle does not extend to all business transacted, no matter where, with a citizen of said State. In other words, as above stated, the policy of insurance might have been applied for in person in Indiana, the insured examined there, the policy delivered to him there, and the premiums paid there, and afterwards the insured moved to the State of Pennsylvania.

We submit that an entirely different case is made out by the pleadings in the case at bar. Here the pleadings show that the plaintiff was a corporation, organized to write fire insurance in various States of the Union, that that was the business for which it was created, and that in pursuance of the purpose for which created, it, from 1908 to the date of the loss, wrote policies of insurance upon property located in Florida, and that these policies were solicited by Lowery & Prince and that the premiums were collected by Lowery & Prince, and forwarded to plaintiff less the commissions allowed Lowery & Prince; that during the period when the said policies were being carried, that the plaintiff from time to time requested information from Lowery & Prince, the insurance agents at Tampa, as to the subject matter insured, and from time to time relied upon them in changing the Warranty Companies.

In the *McDonough* case there was nothing in the pleadings to show that the insurance company ever

transacted any business in the State of Pennsylvania, other than the bare fact that there was a policy of insurance written upon the life of a citizen of Pennsylvania. The allegations of the declaration were such as would indicate that the application was made and received in Indiana, and that the policy was executed and delivered there, and that the insured was examined there, and that the premiums were collected there. An entirely different state of facts from that shown by the pleadings in the case now being considered.

There is another clear distinction between the *McDonough* case and this case. The *McDonough* case was based upon a life insurance policy. The court can readily see that the circumstances surrounding the issuance of a life insurance policy are necessarily entirely different from those surrounding the issuance of a fire policy, and the considerations entering into the issuance of the two policies entirely different. In the issuance of a life policy there is mainly to be considered the condition of the health of the insured, his habits, his moral and financial standing, and other elements of fitness that pertain to those main considerations. These conditions might be examined into and decided upon by a life insurance company as well in one State as another, for they are solely matters of examination concerning and decision regarding a person. One could make an application for a life insurance policy in Florida to-day, be examined next week in Georgia and the policy issue to him the week after in New York, and the insured could then permanently locate in New Jersey, and, of course it could not be said that the insurance company was necessarily doing business in New Jersey, simply because a person on whom it had taken a risk had moved there.

The considerations entering into the issuance of a fire policy, deal almost entirely with local conditions. If the building to be insured is situated so many feet from some other building, one rate is effective. If it is closer another rate. If in a city with certain fire protection a different rate is effective than if in a town without that protection. If situated near a frame building or close to a railroad track, the rate is higher than if close to a brick building, away from a railroad track. The court knows that the slightest detail in connection with the location of a building in reference to other adjacent property, the class and use of the adjacent property, and the use of the property that is insured, makes all the difference in the world, first, as to whether the policy will be issued at all, and second, as to the amount of the premium.

The desirability of a fire risk from the moral standpoint of the insured could probably be ascertained without the company doing business in the State where the property is, but the building itself and its surroundings are in the nature of things controlling factors in the risk assumed. A fire insurance company could not intelligently ascertain whether it desired to insure property in Florida without having some one visit the property and ascertain for it the many details that enter into an assumption of the risk. This necessarily requires the sending into the State of some one to obtain these facts for it, or engaging some one already there to obtain them. A person resident in a community should naturally be more familiar with local conditions than a person sent from elsewhere.

The courts have uniformly held, without a single exception so far as we are able to find, that the issuance of a fire policy by a non-resident fire insurance

company constitutes doing business in the State where the property is, to the extent that in so issuing the said policy, the insurance company accepts the laws of the State where the property is located.

We particularly call attention to *Stanhibler, et al*, v. *The Mutual Mill Insurance Company*, 76 Wisc. 629, where the facts were that application for fire insurance was made in Chicago, to an Illinois corporation, and the premium was paid there and the loss was payable there. The property, however, was in Wisconsin, and the policy provided, or at least the application for the policy provided, that there was to be total concurrent insurance upon the property, including the policy in question of $40,000.00. The policy also contained a clause known as a three-fourths clause.

The statutes of Wisconsin provided, that in order for anything in the application for a fire insurance policy to be binding upon the insured, that a copy of the application must be attached to the policy, and further that whoever solicits insurance on behalf of any insurance corporation, or who makes any contract of insurance, shall be held an agent for such corporation to all intents and purposes.

The property insured in Wisconsin was burned. The insurance company refused to pay on the grounds, first, that the three-fourths clause had not been lived up to by the insured, and second, that the $40,000.00 concurrent insurance had not been carried, and at the date of the fire, there was only $25,000.00 concurrent insurance. The plaintiff replied that when this policy was issued, one Rudolph, who solicited the policy, and who effected the insurance, represented to the insured that the policy issued or to be issued upon said application did not and would not contain the three-fourths

clause. Further that the application for the insurance, which contained the obligation to carry the $40,000.00 insurance on the property, was not attached to the policy of insurance as required by the laws of Wisconsin. The insurance company contended that it was not bound by the action of Rudolph, because he was not their common law agent, or agent by contract, and the statute which provides that whoever solicts insurance on behalf of any insurance corporation should be held an agent of such corporation to all intents and purposes, did not apply to it, because it was a foreign corporation and that the policy of insurance was an Illinois contract, and executed and delivered in Illinois. It also contended that the statutes of Wisconsin requiring a copy of the application to be attached to the insurance policy, did not apply, because it was a nonresident, had never qualified to do business in Wisconsin, and was not bound by the laws of Wisconsin. In other words, the insurance company in the *Stanhibler* case, made identically the same defence as the plaintiff here makes.

The Supreme Court of Wisconsin in deciding the case used the following language:

> "It is conceded that at the time of issuing the policy the defendant company had no license to do business in this State. The broad contention is, that this contract of insurance is to all intents and purposes an Illinois Contract and that although it was for the insurance of property in Wisconsin, yet that it was binding upon the parties without the compliance with the statutes of this State, and regardless of their requirements. It is to be remembered that a contract against loss by fire, is a contract of indemnity. In fact, this is elementary, and needs no citation of authority, although it may relate to the loss of real title

property, yet it in no way attaches to or affects the title of such property. Foreign insurance companies are not compelled to do business in this State. If they voluntarily choose to do so, however, they must submit to such conditions and restrictions as the legislature may see fit to impose. Citing 31 N. S. Reporter, p. 229.

In support of that proposition numerous decisions are cited in that case, not only from this court and courts of other States, but of the Supreme Court of the United States. As there indicated, the court has uniformly held that such State legislation does not pertain to matters of interstate commerce, nor the privileges or immunities of citizens in the several States, and this clause is therefore quoted from an opinion of the court by Mr. Justice Field:

> "They (the several States) may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."
>
> *Paul* v. *Virginia*, 8th Wallace, 181.
> *Ducat* v. *Chicago*, 10th Wallace, 410.
> *Insurance Company* v. *Mass.* ld. 566.
> *Association* v. *New York*, 119 U. S. 117.
> *Fritts* v. *Palmer*, 132 U. S. 281.

The court in deciding the *Stanhibler* case, also used the following language:

> *"A contract of insuring property in this State, necessarily involves the doing of business in this State, and hence is subject to the laws of this State. The location, amount, condition, preservation, care construction and value of such property, and the evi-*

dence relating to the same are objects of local concern and business, and hence objects of local legislation.

"We must hold that the trial court properly excluded from its consideration, as evidence, the application in question, by reason of the omission to attach a copy of the same to the policy, or to endorse it thereon.

The court further held that the insurance company was bound by the act of its statutory agent, in stating that the policy would not contain a three-fourths clause.

The *Stanhibler* case above referred to, 76 Wisc. 285, is on all fours with the case now being considered, and clearly decisive of the merits of the assignments of error, one to five. For these assignments are based solely on the idea that the business was transacted in Pennsylvania, not Florida, and that plaintiff was not answerable to the laws of Florida. See also *Rose* v. *Kimberly & Clark*, 89 Wisc. 545, where it is held that a contract by a foreign insurance company insuring property in the State of Wisconsin, necessarily involved doing business in said State.

See also *Pierce* v. *People*, 106 Ill., p. 11 and *Hacheny* v. *Leary*, 12 Oregon, p. 40.

See also *Swain* v. *Munson*, 191 Pa. 582.

We call court's attention to the fact that this decision is from the Supreme Court of Pennsylvania, to the protection of the laws of which State counsel for plaintiff so strenuously argues that plaintiff is entitled.

The facts in this case were that an insurance company organized under the laws of Ohio, wrote a fire insurance policy upon property in Pennsylvania and accepted notes of the owner of the property for premiums, etc. The insurance company had not complied

with the laws of Pennsylvania, claimed that it was not doing business in that State and that it had no agents there. The notes were not paid, and suit was brought upon the same in the Court of Pennsylvania. Defense was made on the grounds that the notes were void, because the insurance company had not complied with the laws of Pennsylvania. The insurance company replied that the policy of insurance was an Ohio contract, and that the notes were delivered to it in Ohio, and were therefore Ohio contracts, and that the laws of Pennsylvania could not affect the same. The Supreme Court of Pennsylvania, after stating that it was its opinion that the party who solicited this insurance was the agent of the insurance company, says:

> "But that we may meet a more important question, because it affects the interest of all foreign insurance companies that seek to do business in this State, we prefer to assume that the contract was made in Ohio and is lawful there. It was a contract, however, in direct violation of the laws of this State. It was the indemnification of the citizens of Pennsylvania against losses by fire on property wholly within Pennsylvania, without regard to where the contract was made, the subject of it was property within this State. It is the attempt of a foreign insurance company to do business in this State in violation of the laws of this State."
>
> *Swain* v. *Munson*, 191 Pa. 582.

So the Supreme Court of Pennsylvania has held that the issuance of a fire policy by a foreign insurance company upon property situated in the State other than that of its creation, is doing business in such State, and that in so doing is bound by the laws of such State; therefore, if you apply the laws of Pennsylvania to the case now being considered, as is so urgently demanded

by counsel for plaintiff, this court would have to hold that there is no merit in the assignment of errors, one to five, for the laws of Pennsylvania are not in derogation of any right claimed under the Constitution or its amendments.

See also *Seamans* v. *Temple*, 105 Mich. 400.

We also call the court's attention to the case of *Fred Miller Brewing Company* v. *Council Bluffs Insurance Company*, 95 Iowa, 349. The facts in this case were that one Winchester, a resident of Wisconsin, solicited fire insurance from the plaintiff. The plaintiff agreed to accept a policy in some fire insurance company from Winchester, not knowing what company Winchester intended to insure in. Winchester, by letter, submitted the application for the insurance to one Caldwell, an insurance broker of Chicago, Illinois. Thereupon he submitted the application to Marshall & Company of Chicago, Illinois, who were the agents of the defendant insurance company. Marshall & Company issued the policy sued on in the City of Chicago, and there delivered the same to Caldwell and charged it to Caldwell's account. Caldwell thereupon forwarded the policy to Winchester and the premium was collected by Winchester, his commission was deducted, and the balance was sent to Caldwell. Caldwell thereupon deducted his commission, and delivered the balance in the city of Chicago to Marshall & Company, agents for the insurance company. Afterwards there was a loss, and the insured brought suit in Wisconsin, and served Winchester with process, upon the theory that under the Statutes of Wisconsin as he had procured the policy to be written, he was an agent of the defendant insurance company. A judgment was rendered against the insurance company in

Wisconsin, and sent to Iowa to be there sued on, and suit was instituted in Iowa upon this judgment. It was contended by the defendant in the Iowa suit that the courts of Wisconsin never acquired jurisdiction and that therefore the judgment was void, that Winchester was not its agent, that it had never done business in Wisconsin, that it had no agents there and that the policy was executed and delivered in Illinois by its agent to a broker.

But the Supreme Court of Iowa in a clear, exhaustive and carefully reasoned opinion, upheld the Wisconsin judgment, and held further that Winchester was the agent of the insurance company, although the insurance company did not know him and had never heard of him; upon the theory that when the insurance company issued this policy upon property in the State of Wisconsin, it knew, or could have known, of the statute which made the party who solicited the insurance the agent of the insurance company, and that by so issuing said policy it accepted said statute, and was bound thereby. This case is conclusive as to whether or not plaintiff was doing business within the State of Florida, and as to whether or not Lowery & Prince were its agents.

The questions of law involved in consideration of that case were identical with those involved under sections 2765 and 2777 of the Statutes of Florida, in the disposition of the questions raised in assignments of error one to five, in the Supreme Court of Florida.

From the above authorities it is clear that when the plaintiff in 1908 issued a policy of insurance upon defendant's property in Florida, that it then and there became answerable to the Statutes of Florida, so far as the same applied to or affected this insurance. It

knew, or could have easily ascertained, and was charged with knowledge that sections 2765 and 2777 of the Statutes of Florida made Lowery & Prince its agents, and yet it continued to use Lowery & Prince to carry on its business in Florida from 1908 to 1912, and received all the benefits accruing from this business, and we submit it should not be permitted after liability stared it in the face to deny the agency of Lowery & Prince.

Errors 6 and 7 Assigned to the Supreme Court of Florida.

It is contended under the above two assignments of error that the court below erred in sustaining defendant's demurrer to rejoinder of the plaintiff on the ground that the rejoinder was a complete answer to defendant's replications and on the further ground that the replications of defendant were bad and the judgment should have been rendered against it on that ground. Counsel for plaintiff first argued that the rejoinder was a complete answer to the replication because as a matter of law Lowery & Prince were not agents of plaintiff. We have already answered this contention fully under the preceding heading and will proceed here on the assumption that Lowery & Prince under the laws of Florida were the agents of the plaintiff.

As to the contention that the rejoinder is a complete answer to the replication it is clear that if it is the law that in writing fire insurance policies in Florida by a foreign corporation upon properties in Florida, constitutes doing business within the State, and that it is further the law that by so doing business the insurance company becomes answerable to the statutory laws of the State, that then the demurrer to the rejoinder

should have been sustained, because the rejoinder clearly admitted and showed the writing of the policies on Florida property by the plaintiff and that these policies were procured and caused to be written by Lowery & Prince, and such transaction was clearly covered by sections 2765 and 2777 of the General Statutes of Florida.

It is contended by counsel for plaintiff that the replication filed by defendant neither singularly nor as a whole answered the plea, and for that reason was bad.

This contention is without merit, as in plaintiff's first plea it is charged that plaintiff was not engaged in the transaction of business in Florida; that the policies were executed and delivered in Pennsylvania, and were secured through Lowery & Prince as brokers of defendant.

The first replication fairly and squarely met this by denying that plaintiff was not engaged in the transaction of business in Florida, and reciting facts to show that it was so engaged, which raised the question of law as to whether or not the said facts constituted doing business in Florida. This part of plaintiff's first plea was answered by a separate replication, because the same set up distinct matter of defense, and was in no way related to that portion of the first plea denying liability on the grounds of a breach of warranty.

The second replication also met the first plea. It admitted that the policy had attached thereto the warranty mentioned, but charged that at the time the policies were delivered that it was advised that it could disregard the same by Lowery & Prince, whom it alleged were the statutory agents of the plaintiff.

The third replication squarely answers all that portion of the first plea not answered by the first and

second replication, by likewise admitting that the policies sued on had attached thereto the warranty clause alleged, but charging that Lowery & Prince, whom it is alleged were the statutory agents of plaintiff, notified defendant that the American Central Insurance Company desired to cancel certain policies, and suggested that policies for a like amount should be written in other companies, and that in doing so the warranty referred to would be complied with. In other words, the plaintiff by its plea says that it was not liable because it was a non-resident; never had done any business in the State; had no agent in the State and second, because the policy contained a provision or warranty that was violated.

The first replication meets the first contention, and the second and third replication charges that the statutory agents of plaintiff advised defendant at the time the policies were delivered, that the warranty clause could be disregarded and afterwards actually made the change in the warranty companies, and advised defendant that such changes were not in violation of the warranty clause.

We submit that the replications were good and that the demurrer should have been sustained.

Errors 8 to 11 Assigned to the Supreme Court of Florida.

The above referred to errors assigned that the court erred in holding that your defendant here could secure reformation of a policy sued on in a court of law in holding that Lowery & Prince had authority to abrogate the contracts represented in the policy sued on and make new and different contracts with the defendant and in holding that the defendant could recover in different causes of action from those set

up in its declaration and in sustaining the demurrer of the defendant to plaintiff's second plea.

These assignments can all be considered together.

Counsel for plaintiff contends that the remedy of defendant was in a Court of Equity to have the policies reformed and cites *Erickson* v. *Ins. Co.* 62 Fla. 161, and other authorities. The cases cited do not sustain the contention because the facts in those cases were entirely different from the facts set out in the replication and rejoinder in this case. In the *Erickson* case, the insured was without any insurable interest in the property, and there is a clear distinction between a waiver of the warranty clause in an insurance policy which is made for the benefit of the insured (which can be done) and the waiver of the necessity for the insured to have an insurable interest.

Gibbs v. *Richmond County Mutual Insurance Co.* 9 Daily N. Y. 203.

19 Cyc. of Law and Procedure, p. 777.

Eagle Fire Insurance Company v. *Lewallen*, 56 Fla., p. 246.

Counsel for plaintiff in error under assignments 6 and 7 before the Florida Supreme Court contended that an insurance company has a right to insert stipulations for its protection, and that a breach thereof avoids the policies, and cites numerous authorities. This contention is not sound; in that at most the breach of such a warranty as was attached to the policy sued on in this case would only make the policy voidable and not void.

Eagle Fire Insurance Company v. *Lewallen*, 56 Fla., p. 246.

But admitting for the sake of argument, that an abso-

lute breach would avoid the policy, still the authorities cited by counsel for plaintiff would not apply, because there never was a breach of the warranty clause. Before the American Central Insurance Companies' policies were cancelled, plaintiff, through Lowery & Prince, their statutory agents, waived the warranty clause in question.

Plaintiff contends that the warranty set up in defendant's plea was in the nature of a condition precedent, and therefore could not be waived. We submit that first the warranty was not a condition precedent, and second, even if it was, it could be waived like any other clause in an insurance policy made for the benefit of the insurance company. As to whether this alleged warranty was in the nature of a condition precedent, we first call attention to the clause itself, and to the fact that it is not a part of the written standard policy, but separate and distinct, pasted or stamped on the regular policy, also to the vague, uncertain and ambiguous way in which it is worded. From a careful reading of the clause though we assume the intention of the insurance company was to provide thereby that during the life of the policy, that the American Central Insurance Company of St. Louis should also carry at least $5,000.00 insurance on the same property insured by plaintiff, and that in the event of its not doing so, that then said policy issued by it should be null and void. This warranty could not be construed to be anything else than promissory. The plaintiff delivered the policy and said we will insure your property, but you must promise to keep a certain amount of other insurance in another company on it. The policy is delivered and thereby becomes effective, so it depends upon the future action of the insured as to whether

or not under the terms of the policy it is to remain in force. We submit that plaintiff itself, by its action, has construed the warranty under consideration to be a condition subsequent, and previously waived the condition. And here we call attention to plaintiff's rejoinder (pp. 31, 32, rec.), where it is admitted that from 1908 to the time of the writing of the policy sued on, plaintiff wrote various insurance policies covering defendant's property, including the policies sued upon, each of which contained a similar warranty clause, and that from time to time at the request of Lowery & Prince, the names of the companies were changed, as such companies designated cancelled their risks on the property, and where it is admitted that the American Central Insurance Company of St. Louis, Mo., was inserted in the warranty at the special request of Lowery & Prince.

We therefore submit that plaintiff's contention that the warranty clause in question was a condition precedent and could not be waived, is not only contrary to common sense and reason and to the plain meaning and intent of the warranty itself, but to the plaintiff's own construction placed upon the clause by several times waiving the same when from time to time at request of Lowery & Prince the names of the companies were changed.

If the terms of a written contract are in any way doubtful and if the construction placed upon the same by the action of the parties is reasonable, the construction as shown by such action of the parties will be accepted by the court.

Webster v. *Clark*, 34 Fla., p. 637, 653.
Shouse v. *Doane*, 39 Fla., p. 95.

Then again a condition precedent can be waived as

readily as a condition subsequent, and here we call attention to 19 Cyc., p. 777, where the following language is used.

> "When an insurance contract is conditioned to become void in case there be a breach of a condition precedent or subsequent, the true meaning is not that the instrument is upon a breach, thenceforth a nullity, and has no legal existence but only that upon the violation of the covenants by the insured that the insurer shall cease to be bound by his covenants. Inasmuch, therefore, as such conditions are inserted for the benefit of the insurer, they may all be waived by him, except when the insured by the act loses his insurable interests," citing decisions from the Supreme Court of Illinois, Iowa, Kansas, Missouri, Nebraska, Pennsylvania, Virginia, Wisconsin and the United States Supreme Court.

We do not, however, have to look beyond the decisions of Florida to settle the character and status of the clause and that it could be waived.

In *Tillis* v. *Liverpool, London and Globe Insurance Companies*, 46 Fla., p. 268, the court held: That the iron safe clause was a promissory one and could be waived by an agent. This clause provided for the keeping of books and taking of inventory, etc., and that failure to do so should render the policy void. In this case the court also held that the following provision in the policy that was being considered, that:

> "The use of the general terms or anything less than a distinct specific agreement clearly expressed and endorsed on the policy shall not be construed as a waiver."

might itself be waived.

In *Hartford Fire Insurance Company* v. *Redding*, 47

Fla., p. 228, the court held that the warranty against other insurance contained in the standard policies could be waived by an agent of the insurance company, and that this clause could be waived, even if the other insurance existed at the time of the issuance of the policy. In other words, the policy in the *Redding* case provided, in effect, that if there was then or should thereafter, be placed upon the property any other insurance without the written consent of the insurance company, that the policy should be void. The court held that if the agent of the company knew of the writing of the subsequent insurance or of the insurance already being upon the property, that it constituted a waiver. By the same reasoning we can not escape the conclusion that if the defendant had never had a policy in the American Central Insurance Company, or if it had had and permitted it to be cancelled, and that the agent of plaintiff knew that it had never had it or that it had permitted it to be cancelled, that that would constitute a waiver of this clause. Certainly a stipulation in a policy to the effect that there is no other insurance on the property, which stipulation is agreed to by the insured by the acceptance of the policy, is more in the nature of a condition precedent than a stipulation to the effect that the insured will thereafter carry certain additional insurance. To the same effect is the

Eagle Fire Insurance Company v. *Lewallen*, 56 Fla. 246.

This last case is clearly decisive of whether the warranty clause could be waived by the agent of the insurance company. The defense in the *Lewallen* case by the insurance company was also based upon a breach

of the warranty clause warranting against additional insurance. The insured admitted that he had obtained additional insurance, but claimed the clause against the same had been waived, by reason of the fact that he notified the agent of the insurance company of such additional insurance, and that the agent agreed to make the necessary endorsement, but failed to do so.

Now on principal there is absolutely no difference between the warranty set up here as a defense and the warranty claimed to have been violated in the *Lewallen* case. The purpose of each is identical, to wit: The protection of the insurance company. In the case here, by a warranty that the defendant should carry a certain additional insurance in order that if there was a fire others would bear their pro rata share of the loss. In the *Lewallen* case that the insured would not carry additional insurance, protection by strengthening the moral risk and taking away from the insured incentive to destroy the property. Insurance companies do not make their profits by paying losses, and for one and the same purpose have to provide against opposite contingencies under varied conditions. Many of these conditions are obtainable only through local sources. To employ those sources, use them and pay the source for that use as was done here, and then to deny the agency of the source used shows *at least* legal obliquity.

It is not necessary to go into a lengthy analysis of the *Lewallen* case, to show that it clearly settles the law in Florida on the question of the waiver by an agent of a warranty clause, such as was inserted in the policy sued on in this case.

It is contended by counsel for plaintiff that, admitting for the sake of argument that some agents could waive a clause of the kind under consideration, and that

Lowery & Prince were the agents for some purposes of the plaintiff, that still they were not such agents as could waive this clause, this brings the court to a construction of sections 2765 and 2777.

Now, we submit that if Section 2765 is binding at all upon the plaintiff by reason of it having done business in Florida, that it is binding with its entire force, and the section clearly states that whoever receipts for any money upon any contract of insurance or receives the same from any other person to be transmitted to any insurance company for any insurance policy or any renewal thereof, although such policy of insurance was not signed by the person receiving said money or receipting for same or transmitting the same, or who in anywise, directly or indirectly, makes or causes to be made any contract of insurance for or on account of any insurance company, shall be deemed to all *intents and purposes* an agent or representative of such insurance company. The language "to all intents and purposes" can have no other meaning, and could have been used by the Legislature of Florida in the enactment of this law for no other purpose, than to make the person or persons who caused or procured this insurance policy to be written, and who receipted for money and transmitted the same, given for insurance policies, the agent of the insurance company for all purposes as fully as had the insurance company without the intermediary of such agency dealt with the insured. If it does not mean that, it does not mean anything, and was simply useless legislation.

And here we call attention again to *Stanhibler, et al*, v. *Mutual Mill Insurance Company*, 76 Wisc. 627. There is a statute in Wisconsin which reads:

"Whoever solicits insurance on behalf of any

> insurance corporation, or who makes any contract of insurance, shall be held an agent of such corporation, to all intents and purposes."

The insurance company in the case referred to had never qualified to write insurance in Wisconsin and had no office in said State. The application for the insurance was made and dated in Chicago, where the premium was paid. The person who caused the policy to be written was not a regular appointed agent of the insurance company, but in soliciting said insurance from the insurer, the solicitor stated to the insured that the policy would not contain and did not contain what is known as a three-fourths clause. The policy, however, did contain such a clause, and the same was not complied with by the insured. A fire occurred and the insurance company denied liability, by reason of the failure of the insured to comply with the said three-fourths clause; but the Supreme Court of Wisconsin applied the law above quoted to the person who solicited this insurance, and caused the policy there to be issued, and held that such person was the agent of the foreign insurance company, and had authority to waive the clause referred to.

It is a significant fact that that portion of the Florida statute with which we are particularly concerned, and the Wisconsin statute, are identical. That is, that portion of the statute which defines the kind of an agent a person is. The Wisconsin statute provides that a person who solicits insurance, etc., shall be held an agent of the insurance company, *to all intents and purposes*, the identical language used in the Florida statute. Therefore, if Lowery & Prince were the agents of the plaintiff at all, they were their agents *to all intents and purposes*, which language as construed

by the decisions above referred to by the Supreme Court of Wisconsin means that they are agents with power and authority, to waive any clause in the policy that the company itself could waive.

We also again respectfully call attention to the case of *Fred Miller Brewing Company* v. *Council Bluffs Insurance Company*, 95 Iowa, 349.

It is contended by counsel for plaintiff under assignments of error 8 and 10 to the Supreme Court of Florida that the action of the court in sustaining demurrer and entering judgment constituted a reformation of the policies sued on, and permitted defendant to recover a judgment on a different cause of action than that set forth in the declaration.

There is no merit in these two assignments. If the defendant had not had an insurable interest in the property, reformation in the policies covering the same might have been necessary and these assignments might have been good, but, as heretofore stated, there had never been a breach of the warranty clause depended upon by plaintiff but the clause was waived by plaintiff, and therefore was no part of the policy after the waiver. The contract as originally made had attached thereto a clause that was afterwards waived. When the suit was brought, it was brought upon the contract as modified by the waiver, and it was not necessary to allege in the declaration the waiver, as the clause waived was inserted for the benefit of the insured, and was a matter of defense, and when the same was pleaded defendant here, replied, setting up the waiver. Therefore, the warranty having been waived, there was no need for a reformation for there was nothing to reform, neither was there any departure. See *Indian River State Bank* v. *Hartford Fire Insurance Company*,

46 Fla. 243; *Hartford Fire Insurance Company* v. *Redding*, 47 Fla. 228, and *Eagle Fire Insurance Company* v. *Lewallen*, 56 Fla. 246.

The eleventh error assigned by plaintiff to the Supreme Court of Florida is predicated upon the order of the court sustaining demurrer to plaintiff's second plea. The second plea set up as a defense the existence of a mortgage at the time the policy was issued, which it claims that plaintiff did not know of. The plea is as follows:

> "And for a second and further plea the defendant says, that at the time of the execution and delivery of the policies sued on and each of them, and at the time said policies were expressed to go into effect, and at the time of plaintiff's loss, the entire property insured, including all of the personal property insured was subject to, and incumbered by the mortgage to W. G. Wells, set forth in plaintiff's proof of loss annexed to said declaration, on which there was due a large sum of money, the existence of which mortage was unknown to defendant until said proofs of loss were furnished it, *whereby the said policies* according to the terms thereof, became null and void," p. 21, rec.

The declaration and proof of loss attached thereto shows that there was included in the property insured which was lost by fire, real estate and fixed saw-mill and veneer machinery, which, of course, was likewise a part of the real estate.

The authorities all hold that where a mortgage is regarded merely as giving the mortgagee a lien, that the same is not a violation or breach of the condition that the insured's interests shall be an entire, sole, and unconditional ownership, 19 Cyc. p. 694. But counsel for plaintiff contends in his brief, that this

plea was divisable, but we submit no such construction can be placed on it. It is clearly interposed as an absolute defense to the entire action, as the concluding words of said plea are as follows:

> "Whereby the said policies, according to the terms thereof, became null and void."

And the court could do nothing else except sustain the demurrer to the plea, because it was so framed as to make it indivisable.

Counsel for plaintiff contends that the proof of loss shows that more than ninety per cent of the property that was lost was personal property. A mere reading of the proof of loss will show the error of this statement. Item 2 of the schedule was involved, which carried $8,500.00 on fixed and other machinery. Item 6 of the schedule carried $11,000.00 fixed and other machinery. Proof of loss attached to the declaration recites that the property destroyed that was insured under item 2 of the schedule was saw-mill machinery, and that the property destroyed covered by item 6 of the schedule was veneer mill machinery (pp. 5–13, rec.). Therefore, so far as the declaration and proof of loss is concerned, all the property that was destroyed by the fire might have been fixtures, and this was a matter of defense that plaintiff in error could set up if it saw fit. Therefore, it was incumbent upon it to so frame its plea as to set up a defense to some specific part of the policy under the chattel mortgage clause.

All of which we respectfully submit.

BENJ. MICOU,
JOHN H. TREADWELL,
E. D. TREADWELL,
Counsel for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1918.

No. 308.

AMERICAN FIRE INSURANCE CO.

vs.

KING LUMBER & MANUFACTURING CO.

REPLY BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS.

It is contended in support of the motion to dismiss the writ of error in this case that this court has no jurisdiction, because, it is said, the Supreme Court of Florida, "by holding section 2765 of the General Statutes of the State *valid* and applicable to the contracts sued upon did not draw in question the validity of the statute of any State on the ground of its being repugnant to the Constitution, a thing it would have had to have done before this court would acquire jurisdiction." (Brief for defendant in error, page 11.)

> "Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is

fairly open to denial and denied, the validity of such statute is drawn in question."

Baltimore, etc., R. Co. *vs.* Hopkins, 130 U. S., 210.

Miller *vs.* Railroad Co., 168 U. S., 131.

By the assignments of error filed in the Supreme Court of Florida it was contended that section 2765 of the General Statutes of Florida, as construed to be applicable to the contracts of insurance sued upon, encountered the following provisions of the Federal Constitution:

(1.) Section 1 of Article IV, requiring full faith and credit to be given to the laws of Pennsylvania.

(2.) The provisions of the 14th Amendment prohibiting (*a*) any State law which shall abridge the privileges or immunities of citizens of the United States; (*b*) any State from depriving any person of life, liberty or property without due process of law; and (*c*) the denial to any person of the equal protection of the laws; and

(3.) Article VI, requiring the judges in every State to be bound by the Federal Constitution, anything in the Constitution or laws of the State to the contrary notwithstanding.

The same contentions, in substance, are made in this court, and we do not understand the basis for the assertion that the validity of the statute was not drawn in question in the State court. The transcript shows that the same contentions were made in the court of first instance (Transcript, p. 26), and they have been consistently relied upon throughout the litigation. It is admitted at the outset of the majority opinion in the State court that the first five assignments of error "present questions arising under the Constitution of the United States." (Transcript, p. 43.) It is true that each assignment of error contained a statement that the policies were made in Pennsylvania, which was the fact, and that the Supreme Court of Florida, in substance, limited its discussion to the sole question whether or not the contracts of insurance

were Pennsylvania contracts, apparently assuming that to settle all the questions presented by the assignments of error, but it expressly decided against the contentions made by all these assignments of error. (Transcript, p. 55.)

Of course, if there were an independent non-Federal ground broad enough to sustain the decision of the State court, there would be no right of review in this court; but that is not the case, and we do not even understand it to be the rule that the decision of the State court, that the contracts were Florida contracts, is conclusive in this court, on the assignments of error presenting that question.

Postal, etc., Co. *vs.* Newport, 247 U. S., 464.
Royal Arcanum *vs.* Green, 237 U. S., 531.
New York, etc., Ins'ce Co. *vs.* Dodge, 246 U. S., 357.

In any event the statute attacked, as construed by the State court, is repugnant to the 14th Amendment to the Constitution of the United States in the respects pointed out in the main brief for plaintiff in error, as applied to the contracts of insurance, regarded as Florida contracts; hence it is impossible that there can be an independent non-Federal ground broad enough to sustain the decision of the State court. The State court rested its judgment solely upon the statute, and it could not do so without holding the statute valid, as against the objections urged to its constitutionality, so that it is not material to what extent the matter received discussion in the opinion of the State court.

Consolidated Coal Co. *vs.* Illinois, 185 U. S., 203.
Chicago, etc., Ins'ce Co. *vs.* Needles, 113 U. S., 574.
Yazoo, etc., R. Co. *vs.* Adams, 180 U. S., 1.
Chapman *vs.* Goodnow, 123 U. S., 540.

The fact, if it were a fact, that the contracts were Florida contracts, was not an *independent* ground for the decision of the State court, because it was inseparable from the contention as to the denial of full faith and credit to the laws of Pennsylvania. Much less was it an independent ground adequate to dispose of the case, because the contentions that the

statute, as construed, violated the 14th Amendment were independent of the question whether the contracts were made in Pennsylvania or not, although tne fact that they were made in Pennsylvania might accentuate the transgression.

The recital in each of the assignments of error filed in the State court that the policies "were made in the State of Pennsylvania" was a mere recital of a fact admitted by tthe declaration and exhibits thereto. (See policies and proofs of loss; Transcript, pages 5, 12.) The policies directly showed it on their faces. The proofs of loss, made parts of the declaration, directly averred it. It was admitted by the demurrer to the rejoinder on which judgment was rendered. (Transcript, page 32.) No one could suppose that there could or would be a contention to the contrary, as is, indeed, evidenced by the minority opinion, and the erroneous decision of the majority on this point could not eliminate the contentions presented by the assignments of error that the statute, as construed, violated the provisions of the Federal Constitution specially called to attention thereby.

II.

A suggestion is made that the court, on this writ of error, should disregard some of the allegations of fact in the rejoinder, admitted by the demurrer thereto, upon which judgment was rendered, by taking judicial cognizance that the case of Swing *vs.* Munson, 191 Pa., 582, takes away the predicate for those allegations as to the effect of the laws of Pennsylvania; but, of course, this court on writ of error to the Supreme Court of Florida cannot take judicial notice of the laws or decisions of Pennsylvania, whatever they may be.

Hanley *vs.* Donoghue, 116 U. S., 1.
Lloyd *vs.* Matthews, 155 U. S., 222.

Respectfully submitted,

GUSTAVUS REMAK, Jr.,
JAMES F. GLEN,
Counsel for Plaintiff in Error.

(40284)